APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED SEPTEMBER 8, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 04-12206
Non-Argument Calendar

D.C. Docket No. 01-02038-CV-TWT-1

FRAN JONES,

Plaintiff Appellant,

versus

ROCKDALE COUNTY, GEORGIA,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(SEPTEMBER 8, 2004)

Before BIRCH, DUBINA and PRYOR, Circuit Judges.

PER CURIAM:

Fran Jones appeals a grant of summary judgment in favor of Rockdale County. Jones sued Rockdale County (County) along with several other defendants and alleged that they

damaged a lake on her property during a construction project to widen State Route 20 (SR20). All of the other defendants were voluntarily dismissed; only the County remains. Jones contends that the project polluted her lake, but the record shows the County neither owns nor controlled the project. Jones argues that the district court erred when it (1) held that the County did not violate the Clean Water Act (CWA), 33 U.S.C. section 1251 *et seq.*; (2) held that the County did not violate the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. section 6901 *et seq.*; (3) excluded, as a sanction for discovery misconduct, evidence relating to the ownership of the Lennox Drive culvert that Jones belatedly maintains is a point source for polluted water and solid waste; and (4) held that Jones's state law claims were barred by the ante-litem notice requirement under Georgia law, O.C.G.A. section 36-11-1. For the reasons stated below, we affirm.

I. STANDARD OF REVIEW

We review *de novo* the grant or denial of summary judgment and view the record and all factual inferences in the light most favorable to the nonmoving party. *Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1525-26 (11th Cir. 1997). The decision of a district court to exclude evidence is reviewed for abuse of discretion. *Chapman v. AI Transp.*, 229 F.3d 1012, 1023 (11th Cir. 2000).

II. DISCUSSION

We address first the exclusion of the Lennox Drive culvert evidence, because that ruling affects the analysis of Jones's CWA and RCRA claims. We then address the merits of Jones's complaint under the CWA, RCRA, and state law.

Appendix A

A. Lennox Drive Evidence

Jones argues that the district court erred by excluding evidence relating to the ownership by the County of the Lennox Drive culvert. The district court excluded that evidence because Jones refused to answer fully interrogatories propounded by the County and Jones did not assert ownership of the Lennox Drive culvert as a theory of liability until after discovery had ended. Jones contends that even if she was wrong in not fully answering the interrogatories, the error was harmless.

We disagree. To prevent the exclusion of this evidence, Jones bore the burden of convincing the district court that her non-responsive answers to the interrogatories were harmless. Fed. R. Civ. P. 37(c)(1). Jones objected to the interrogatories and stated that the information sought could be obtained from her complaint and from her deposition testimony, but as the district court found, Jones maintained throughout discovery that the County was liable for the faulty design of the SR20 project, not because it owned the Lennox Drive culvert. Jones belatedly asserted her Lennox Drive theory of liability after the County based its defense on lack of ownership and control of SR20. To allow Jones to change her theory of recovery after the County moved for summary judgment would have prejudiced the County, and it is that type of injustice that the discovery rules are intended to prevent. *Cf. Shelak v. White Motor Co.*, 581 F.2d 1155, 1159 (5th Cir. 1978) ("Plaintiff's disregard for the federal rules of discovery in this area created a `trial by ambush' which those rules are designed to prevent."). We conclude, therefore, that the district court did not abuse its discretion by excluding the Lennox Road ownership evidence.

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B. CWA Liability

Jones argues that the district court erred by holding that the County was not liable under the CWA. She contends that the involvement of the County in the SR20 project makes it liable under the citizen suit provision of the CWA, 33 U.S.C. section 1365. The County, in Jones's view, is a discharger of polluted water into her lake.

The CWA allows citizens, acting as private attorneys general, to sue entities that discharge pollutants into the navigable waters of the United States without obtaining a permit in advance. An alleged violation must be ongoing for relief to be available under section 1365(a). Section 1365(a) states, "[A]ny citizen may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of an effluent standard or limitation under this chapter. . . ." 33 U.S.C. § 1365(a) (emphasis added). The Supreme Court has held that this provision does not permit citizen suits for wholly past violations. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 64, 108 S. Ct. 376, 385 (1987). Section 1365(a) does not serve as a tort remedy for private actors; its purpose is abating pollution. *See id.* at 61, 108 S. Ct. at 383.

The record is undisputed that the County does not own or maintain SR20, and the County was not the final authority on matters relating to the SR20 widening project. Although the County played a role in obtaining the allegedly faulty design, the County was required to submit the plans to the Georgia Department of Transportation (GDOT) for final approval. The County recognized that there were potential

problems with the design that could affect Jones's lake, and the County recommended design changes to address those concerns. GDOT rejected those recommendations. The County, therefore, was not responsible for the design flaw at issue, and it cannot be liable as a discharger of pollution. *Cf. City of Las Vegas v. Clark County*, 755 F.2d 697, 703 (9th Cir. 1985) ("defendants are not dischargers and cannot be in violation of [section 1365(a)]"). Summary judgment was appropriate.

C. RCRA Liability

Jones argues that the district court erred by holding that the County was not liable under the RCRA. Under 42 U.S.C. section 6945(a), a person may not, without a permit, dispose solid waste in any place other than a landfill. Jones sued the County, under 42 U.S.C. section 6972(a), which allows citizens to bring suit against violators of the RCRA. She contends that the County is liable for the solid waste (silt and trash) that is carried from a neighboring property by stormwater runoff from SR20 and deposited into her lake. For the County to be liable, Jones must show that the County is the entity responsible for discharging the water that flows across the neighboring property and into her lake. *See* 42 U.S.C. § 6945(a) (RCRA enforceable only against "persons engaged in the act of open dumping").

As was true of her claim under the CWA, Jones erroneously contends that because the County was involved in the planning of the SR20 project, it is liable for the waste generated by the stormwater runoff. In support, Jones cites *Cox v. City of Dallas*, 256 F.3d 281, 296 (5th Cir. 2001), in

which the Fifth Circuit held that the City of Dallas was liable for RCRA violations committed by city contractors. *Cox* does not help Jones, because in *Cox* Dallas had control over the contractors who illegally disposed of the solid waste, and Dallas exercised that control negligently. *Id.* at 296-97.

The County did not have control over the SR20 project; the record is undisputed that ultimate authority was vested in the GDOT. The County, unlike Dallas, had no authority to make final decisions relating to how stormwater runoff was directed. We need not address the conclusions of the district court that Jones's claim of "open dumping" is barred by the anti-duplication provision of section 1006, 42 U.S.C. section 6905, and the discharges into Jones's lake are not "solid waste" as defined by the RCRA, even though both appear-to be correct. The record shows that the County did not engage "in the act of open dumping," and the County, therefore, cannot be liable under the RCRA. *See* 42 U.S.C. § 6945(a).

D. State Law Claims

Jones argues that the district court erred by granting summary judgment against her claims brought under state law. Jones contends that she satisfied the ante-litem notice requirement under Georgia law, which requires all claims against counties to be presented within twelve months after they accrue. O.C.G.A. 36-11-1. In the alternative, Jones argues that the ante-litem notice does not apply to this case because the County is engaged in a continuing trespass of her property.

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Jones did not satisfy the ante-litem requirement of O.C.G.A. 36-11-1. Under Georgia law, a cause of action for a taking of property accrues "as of the point in time when the damaging activity has reached a level which substantially interferes with the owner's use and enjoyment of his property." *Hulsey v. Dep't of Transp.*, 498 S.E.2d 122, 126 (Ga. Ct. App. 1998). Jones testified in her deposition that there was a substantial impact on her property from the SR20 project as early as July of 1999. She was required to notify the County of her claim within twelve months of that date. It is undisputed that Jones sent her ante-litem notice on February 28, 2001, well beyond the twelve month limit.

Jones contends that she substantially complied with the ante-litem provision because her correspondence with the County starting in 1996 put the County on notice of her potential claim. We disagree. None of the letters Jones cites contains the level of detail required to comply substantially with the ante-litem statute. *See Burton v. DeKalb County*, 415 S.E.2d 647, 678 (Ga. Ct. App. 1992). The letters amount to nothing more than a general expression of concern over the potential impact of the SR20 project. The record contains no letters sent by Jones to the County after July 1999, the date when Jones first experienced a substantial impact on her property. Notice of claims "must be presented within 12 months after they accrue. . . ." O.C.G.A. 36-11-1 (emphasis added).

In her reply brief, Jones admits that she has always maintained that her citizen suit notice, attached as exhibit A to her complaint, also served as her ante-litem notice. Jones's claim accrued in July 1999; she did not give notice of her

claim until February 28, 2001. Jones failed to comply substantially with the ante-litem statute.

Jones argues, in the alternative, that the ante-litem notice provision does not apply, because the County is engaged in a continuing trespass to her property. Jones erroneously relies on *Gordy Construction Company v. KHM Development Company, Inc.*, 197 S.E.2d 426, 429 (Ga. Ct. App. 1973), in which the Georgia Court of Appeals held that the ante-litem notice requirement did not apply because a defendant committed a continuing trespass. Unlike the defendant in *Gordy*, the County is not engaged in a continuing trespass, because it does not have control over the discharges from SR20.

III. CONCLUSION

We conclude that (1) the district court did not abuse its discretion by excluding the Lennox Road culvert evidence and (2) summary judgment was proper as to Jones's CWA and RCRA claims. We further conclude that Jones's state law claims are barred because she did not give the required twelve month notice to the County.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION FILED JANUARY 30, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

CIVIL ACTION FILE
NO. 1:01-CV-203 8-TWT

FRAN JONES,

Plaintiff,

v.

E.R. SNELL CONTRACTOR, INC., et al.,

Defendants.

ORDER

This is an action seeking damages and injunctive relief for violations of the Clean Water Act, 33 U.S.C. § 1365, the Resource Conservation and Recovery Act, 42 U.S.C. § 6945, and various state law claims. The case is before this Court on cross motions for summary judgment. For the reasons set forth below, the Plaintiff's Motion for Partial Summary Judgment [Doc. 74] is denied. The Defendant Rockdale County's Motion for Summary Judgment [Doc. 73] is granted.

Appendix B

I. BACKGROUND

Plaintiff Fran Jones is a resident of Rockdale County, Georgia. She owns a tract of land situated at 822 Lennox Drive in Rockdale County, consisting of 49.2 acres, including a 3.75 acre lake. The only remaining Defendant in this action, Rockdale County, is a political subdivision of the state of Georgia. The Plaintiff claims that Rockdale County violated the Clean Water Act, the Resource Conservation and Recovery Act, and committed various state law torts because the County is responsible for the deposit of pollutants on her property and in her private lake.

On September 27, 1994, Rockdale County and the Georgia Department of Transportation entered into an agreement to widen from two lanes to four lanes a section of State Route 20 located in Rockdale County, Georgia. (Def.'s Ex. A.) The contract spells out the duties of the parties to the agreement. Rockdale County agreed that it would be responsible for the following: (1) funding the design engineering on the project; (2) obtaining the final right of way and construction plans; (3) acquisition of the necessary rights of way for the project using the Department's funds; and (4) all necessary utility adjustments and relocation costs. (Id.) All plans were subject to the Department's guidelines and required final approval by the Department. (*Id.*) Once the plans for the project were approved and completed, the Department of Transportation was to "let the project for construction," and except as otherwise provided, was to "bear all costs associated with the actual construction" of the project and was "solely responsible" for securing and awarding the construction contract. (*Id.*) Rockdale County

did not participate in the physical construction of the project. (Kaiser Aff. ¶ 7.) "Rockdale County was not responsible for the maintenance of any of the stormwater pipes, paved area or right of way of State Route 20 during the Project or following completion of the Project nor does Rockdale County have any ownership in any of said improvements or right of way." (Kaiser Aff. 8.) The final plans for the project were approved by the Georgia Department of Transportation. (Kaiser Aff. ¶ 12.)

The Plaintiffs property lies near the intersection of State Route 20 and Lennox Road. (Jones Aff. ¶ 2.) The lake on her property receives runoff from her property, an adjacent residential subdivision developed by the Plaintiffs husband, and from the Epiphany Lutheran Church. (Jones Aff. ¶ 4.) The church and State Route 20 are uphill from her property. (Jones Aff. ¶ 6.) The Plaintiff claims that during the widening of State Route 20, she observed sediment discharges into her private lake, erosion and structural damage to her culverts and the lake's shore, fish kills in the lake, water color changes in the lake, and the presence of household type trash and other pollutants in her lake and on her land. (Jones Aff. ¶¶ 8-9.) She claims that the damage to her lake and property is the result of the increased stormwater runoff produced by the improvements to State Route 20. The Plaintiff never granted an easement authorizing the additional stormwater discharge caused by the State Route 20 improvement project. (Jones Aff. ¶¶ 14-15.) The Plaintiff gave her ante-litem notice to the Defendant on February 28, 2001, and then filed this suit in August of 2001. The parties currently await this Court's ruling on cross motions for summary judgment.

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II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only when the pleadings, depositions, and affidavits submitted by the parties show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). An issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is material if it "might affect the outcome of the suit under the governing law." *Id.* The court should view the evidence and any inferences that may be drawn in the light most favorable to the nonmovant. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). The party seeking summary judgment must first identify grounds that show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). The burden then shifts to the nonmovant, who must go beyond the pleading's and present affirmative evidence to show that a genuine issue of material fact does exist. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986).

III. DISCUSSION

The Plaintiff claims that the Defendant violated the Clean Water Act, the Resource Conservation and Recovery Act, and committed various state law torts by causing increased stormwater runoff to flow onto her property and into her lake. The Defendant disputes each of the Plaintiff's claims.

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A. Clean Water Act

The Plaintiff contends that the Defendant violated the Clean Water Act; and she brings this action pursuant to the citizen suit provision of 33 U.S.C. § 1365. The Clean Water Act makes it illegal to introduce pollutants from any point source into the navigable waters of the United States without a permit. 33 U.S.C. §§ 1311(a), 1342. The Plaintiff contends that the Defendant violated the Act by causing stormwater runoff to flow onto her land and into her lake. The Defendant first denies that it discharged any pollutants, and then argues that even if it did, it did not violate the Clean Water Act because the proper permit was not available.

The parties do not dispute that the Plaintiff's lake constitutes waters of the United States within the meaning of the Clean Water Act. The parties do not dispute the fact that stormwater runoff is a pollutant within the meaning of the Clean Water Act. What is disputed, however, is whether the Defendant discharged any stormwater runoff into the Plaintiff's lake. There are two ways in which the Defendant could be a discharger of pollutants into the Plaintiff's lake. First, the Defendant is a discharger if it performed work which created a point source from which pollutants were discharged into the Plaintiff's lake. A point source is "any discernible, confined and discrete conveyance, ... from which pollutants are or maybe discharged." 33 U.S.C. § 1362(14). Second, the Defendant is a discharger if it had responsibility for, or control over, the performance of work which created a point source for the discharge of pollutants into the Plaintiff's lake. *United States v. Lambert*, 915 F. Supp. 797, 802 (S.D. W.Va. 1996); *United States v. Sargent*

County Water Resource Dist, 876 F. Supp. 1081, 1088 (D.N.D. 1992); *United States v. Board of Trustees of Florida Keys Community College*, 531 F. Supp. 267, 274 (S.D. Fla. 1981).

In its Motion for Summary Judgment, Rockdale County argues that the Plaintiff has no Clean Water Act claim against it because it did not "discharge" anything as a result of the widening of State Route 20. The County argues that the Georgia Department of Transportation had responsibility for and control of the highway widening project and, therefore, was the party responsible for any discharges of pollution into the Plaintiff's lake. It is undisputed that State Route 20 is a state highway, owned and maintained by the state of Georgia. A citizen suit under the Clean Water Act is not permitted for purely past violations of the Act. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation Inc.*, 484 U.S. 49, 64 (1987). The Act requires active conduct in order to impose liability in a citizen suit. *Froebel v. Meyer*, 217 F.3d 928, 938-39 (7th Cir. 2000); *City of Las Vegas, Nevada v. Clark County, Nevada*, 755 F.2d 697, 703 (9th Cir. 1985) ("Section 505(a)(1) provides a cause of action only against one discharging excess pollutants into a waterway.") Rockdale County makes a persuasive argument that it is not a "discharger" for stormwater runoff from a highway owned and maintained by the state of Georgia.

Throughout the course of this litigation, the Plaintiff has taken the position that Rockdale County's liability derived from its involvement in the widening of State Route 20. Nevertheless, in her response to the Defendant's Motion for Summary Judgment, the Plaintiff asserts the entirely new

argument (notably absent from her own Motion for Partial Summary Judgment and her first affidavit) that the point source from which pollutants are discharged onto her land and into her lake is the system of "stormwater curbs, gutters, drains, pipes and culverts along the north side of Lennox Road." (Pl.'s Br. in Opp. at 9.) The stormwater drainage system on the north side of Lennox Road (not State Route 20) is owned and maintained by the Defendant. (Def.'s Opp. Ex. 3 at 800889-90.) The Plaintiff contends that the improvements made to that road drainage system to handle the excess runoff from the State Route 20 improvement project make it a point source of pollution discharge within the purview of the Clean Water Act.

Rockdale County contends that the Court should not consider the Plaintiff's new claim because she failed to disclose it during discovery. The Court agrees. The time for discovery had ended and summary judgment motions were pending when the Plaintiff came up with her new theory of liability. In her deposition, the Plaintiff testified that her complaint against Rockdale County was that it failed to take steps to protect her lake in the design and engineering of the highway widening project. (Jones Dep. at 145). The Defendant's Interrogatory No. 2 asked the Plaintiff to state the facts upon which she relied for each claim for relief. The Plaintiff objected to answering the interrogatory on the grounds that the information sought could be obtained from her deposition. This response was incomplete if the Plaintiff was relying upon the County's ownership and maintenance of the "stormwater curbs, gutters, drains, pipes and culverts along the north side of Lennox Road." If she intended to make that claim, the Plaintiff was required by Rule 26(e) to

supplement her response, but she did not. The failure is not harmless; allowing the new claim would completely change the nature of the case. Accordingly, Rule 37(c)(1) requires the exclusion of the evidence that the Plaintiff now relies upon in opposing the Defendant's Motion for Summary Judgment.

Based upon the evidence properly before the Court, there is no genuine issue of material fact as to whether Rockdale County is a "discharger" of pollution into the waters of the United States. It is not because it does not own, maintain or control State Route 20. It was not required to obtain a discharge permit issued by the Environmental Protection Agency or an approved state agency. The Plaintiffs legitimate complaint about the effect on her property of the widening of State Route 20 is with the Georgia Department of Transportation which was a Defendant in this action. Rockdale County cannot be enjoined from violations of the law caused by the ownership, operation and maintenance of a state highway. Rockdale County is entitled to summary judgment on the Plaintiffs Clean Water Act claims.

B. Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act ("Recovery Act") prohibits the open dumping of solid or hazardous waste. 42 U.S.C. § 6945(a). Rockdale County contends that it is entitled to summary judgment on the Plaintiff s Recovery Act claims for two reasons. First, Rockdale County asserts that the type of pollution discharge in this case is exempted from the Recovery Act by the anti-duplication provisions enacted by the EPA. Second,

Rockdale County contends that the discharges in this case are not solid waste as defined by the Recovery Act at 42 U.S.C. § 6903(27). Because Rockdale County is correct on both points, it is entitled to summary judgment on the Plaintiff s Recovery Act claims.

Initially, the pollution discharges at issue in this case are exempted from the coverage of the Recovery Act because they are instead regulated by the Clean Water Act. The Recovery Act itself does not spell out what amounts to an "open dumping" violation, but instead, leaves this to be determined by the Environmental Protection Agency. 42 U.S.C. § § 6907, 6945. In section 6905, Congress provided the EPA with guidelines for applying and integrating the Recovery Act with other legislation, including the Clean Water Act. In pertinent part, Congress said that the Recovery Act regulations could not be inconsistent with the Clean Water Act, and should, to the maximum extent possible, avoid duplication with its provisions. 42.U.S.C. § 6905. The EPA's Administrator took heed to those congressional directives, and in adopting the final version of the Recovery Act's criteria, noted that the regulations were designed to eliminate double liability under the Clean Water Act and the Recovery Act. 46 Fed. Reg. 47050 (1981). In doing so, the Administrator reaffirmed the belief that the enforcement mechanisms of the Clean Water Act were sufficient to handle its own violations. *Id.*

Since the EPA was given authority to determine what constitutes open dumping under the Recovery Act, its construction and regulations are entitled to controlling weight unless "arbitrary, capricious, or contrary to the statute."

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984). Given the fact that the letter of the statute expressed a desire to avoid duplication, the EPA's construction and regulations which avoid duplication are not "arbitrary, capricious, or contrary to the statute." Accordingly, since the pollution issues in this case are covered by the Clean Water Act, Rockdale County is entitled to summary judgment on the Plaintiff's Recovery Act claims. *See Long Island Soundkeeper Fund Inc. v New York Athletic Club*, 1996 WL 131863 (S.D.N.Y. 1996).

Additionally, Rockdale County is entitled to summary judgment because the pollution discharge in this case does not meet the statutory definition of "solid waste." Solid waste, as defined by the Recovery Act, does not include "solid or dissolved materials in . . . industrial discharges which are point sources subject to permits under section 1342 of Title 33." 42 U.S.C. § 6903(27). An industrial activity which would give rise to an industrial discharge includes "construction activity including clearing, grading and excavation, except operations, that result in the disturbance of less than five acres of total land area." 40 C.F.R. § 122.26(b)(14)(x). The State Route 20 improvement project involved construction activities and more than five acres of land. Thus, its stormwater discharges are excluded from the definition of "solid waste:" 40 C.F.R. § 261.4(a)(2) (comment). This exception, of course, was not designed to eliminate all liability for such discharges. Rather, the exception for industrial discharges "subject to permits under section 1342 of Title 33" is a further attempt to avoid duplication with the provisions of the Clean Water Act. *See Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp.

1300, 1328 (S.D. Iowa 1997). Accordingly, because the discharges in this case do not amount to dumping of a "solid waste" as defined by the Recovery Act, Rockdale County is entitled to summary judgment on those claims.

C. State Law Claims

The Plaintiff brought several state law claims against Rockdale County, including nuisance, trespass, negligence and violation of riparian rights. Jurisdiction of those claims is supplemental, based on 28 U.S.C. § 1367. Rockdale County has sovereign immunity as to all claims which do not amount to an inverse condemnation of the Plaintiff s land. *DeKalb County v. Orwig*, 261 Ga. 137, 138 (1991). As to her inverse condemnation claim, Rockdale County contends that the Plaintiffs failure to provide the proper ante-litem notice bars that claim. In Georgia, "[all] claims against counties must be presented within 12 months after they accrue or become payable or the same are barred .. ." O.C.G.A. § 36-11-1. In *Hulsey v. Department of Transp.*, 230 Ga. App. 763 (1998), the Georgia Court of Appeals discussed the accrual of inverse condemnation claims, and held that a taking occurs "as of the point in time when the damaging activity has reached a level which substantially interferes with the owner's use and enjoyment of his property." *Id.* at 766 (internal citations omitted). Generally then, ante-litem notice must be given within twelve months of the point in time when the damaging activity substantially interferes with the owner's use and enjoyment of the property. However, Georgia precedent relaxes the ante-litem notice requirement whenever there is additional damage caused by a continuing nuisance. *Reid v. Gwinnett County*, 242 Ga. 88, 89-90 (1978). Nevertheless,

the damages which may be recovered in such a case are limited to damages suffered during the twelve months preceding the ante-litem notice. *Id.* The continuous nuisance dispensation does not apply here because the County is not responsible for a nuisance caused by the ownership and maintenance of a state highway. The Plaintiffs only legitimate complaint against the County is that the design of the highway widening project was faulty. Therefore, the County was entitled to ante-litem notice within twelve months after the project substantially interfered with her property. The Plaintiff has admitted in deposition that the project substantially interfered with her property as early as July 1999. (Jones Dep. at 140).

It is undisputed that the Plaintiff delivered an ante-litem notice to Rockdale County on February 28, 2001. That is more than twelve months after her action accrued. The Plaintiff, however, contends that she gave the County ante-litem notice of her claims on February 29, 1996. While the Plaintiff did address concerns she had with the handling of the State Route 20 improvement project on multiple occasions, none of her written communications with Rockdale County or its agents substantially satisfied the ante-litem notice requirement. *See Burton v. DeKalb County*, 202 Ga. App. 676, 678 (1992) (substantial compliance with ante-litem notice requirement is sufficient); *Williams v. Lowndes County*, 120 Ga. App. 429 (1969) (ante-litem notice must be in writing). The purpose of the ante-litem notice requirement is to give the County notice of the Plaintiffs grievance, and an opportunity to investigate and settle the claim before suit. *Burton v. DeKalb County*, 202 Ga. App. at 677. Therefore, at a minimum, proper ante-litem notice must

notify the County that the Plaintiff has a claim upon which it may bring suit - generalized complaints about how the County conducts its business are insufficient.

The Plaintiff cited thirteen different times she claims to have provided Rockdale County with written notice of her claims prior to the actual filing of this lawsuit. (Pl.'s Resp. to Def's Statement of Facts at 14-15.) Of those thirteen different times, only six represented communications from the Plaintiff regarding her concerns with respect to the handling of the State Route 20 improvement project. (Jones Aff., Tab 3 at 800886, 800903, 800923, 800924-25, 800927, and 800942.) Out of those six communications from the Plaintiff, none put Rockdale County on notice that the Plaintiff had a claim upon which she might base a lawsuit. Rather, the Plaintiffs communications were expressions of concern about the State Route 20 improvement project, and expressions of the Plaintiff's concern for her lake. None of the Plaintiffs communications referenced a claim she had against the County; indeed, some of her purported ante-litem notice communications were made before any damage was done to her lake or property upon which the Plaintiff could base a claim. (Jones Dep. at 139-40) (stating that there was a substantial impact on her lake from sediment and erosion in July of 1999). Therefore, Rockdale County is entitled to summary judgment on the Plaintiffs state law claims.

Appendix B

IV. CONCLUSION

For the reasons set forth above, the Defendant's Motion for Summary Judgment [Doc. 73] is GRANTED. The Plaintiffs Motion for Partial Summary Judgment [Doc. 74] is DENIED. The Clerk-is directed to enter judgment in favor of the Defendant Rockdale County.

SO ORDERED, this So day of January, 2004.

s/ Thomas W. Thrash
THOMAS W. THRASH, JR.
United States District Judge

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION DATED AND FILED FEBRUARY 3, 2004

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE

NO. 1:01-cv-2038-TWT

FRAN JONES,

Plaintiff,

vs.

E.R. SNELL CONTRACTOR, INC., et al.

Defendants.

JUDGMENT

This action having come before the court, Honorable Thomas W. Thrash, Jr., United States District Judge, for consideration of Defendant Rockdale County's Motion for Summary Judgment, and the court having granted said motion and having directed that judgment be entered pursuant to Rule 84(b), Federal Rules of Civil Procedure, it is

Ordered and Adjudged that the judgment is entered in favor of Defendant Rockdale County.

Appendix C

Dated at Atlanta, Georgia this 3rd day of February, 2004.

LUTHER D. THOMAS
CLERK OF COURT

By: s/ [illegible]
Deputy Clerk

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED NOVEMBER 2, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 04-12206-BB

FRAN JONES,

Plaintiff-Appellant,

versus

ROCKDALE COUNTY, GEORGIA,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION (S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ____ F.2d ____).

Before: BIRCH, DUBINA and PRYOR, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules

of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX E — AGREEMENT DATED SEPTEMBER 27, 1994

AGREEMENT

BY AND BETWEEN

DEPARTMENT OF TRANSPORTATION

STATE OF GEORGIA

AND

ROCKDALE COUNTY, GEORGIA

S.R. 20 from HONEY CREEK ROAD
to RELOCATED S.R. 138

THIS AGREEMENT, made and entered into this 27 day of September, 1994, by and between the DEPARTMENT OF TRANSPORTATION, an agency of the State of Georgia, hereinafter referred to as the "DEPARTMENT", and ROCKDALE COUNTY, GEORGIA, acting by and through its Chairman and Board of Commissioners, hereinafter referred to as the "COUNTY".

WHEREAS, the COUNTY has represented to the DEPARTMENT a desire to improve the roadway facilities along S.R. 20 from south of Honey Creek Road to Relocated S.R. 138; including the extension of the bridge culvert at Almond Branch, currently described as Georgia Department of Transportation Projects No. STP-0869(12), P.I. No. 730903, and BHS-0859(11), P.I. No. 730905, together hereinafter referred to as the "PROJECT"; and

WHEREAS, the COUNTY has represented to the DEPARTMENT a desire to participate in providing the design

needed for the improvements, purchase of right of way, relocating utilities, and other casts as specified in the Agreement, and the DEPARTMENT has relied upon, such representation; and

WHEREAS, the DEPARTMENT has indicated a willingness to participate in the funding of the construction for the PROJECT with funds of the DEPARTMENT, funds apportioned to the DEPARTMENT by the federal Highway Administration, hereinafter referred to as "FHWA", under Title 23, United States Code, Section 104, or a combination of funds from any of the above sources, subject to those certain conditions set forth in the Agreement.

NOW, THEREFORE, in consideration of the mutual promises made and of the benefits to flow from one to the other, the DEPARTMENT and the COUNTY hereby agree each with the other as follows:

1. The COUNTY shall contribute towards the PROJECT by funding the design engineering. The design engineering shall be accomplished in accordance with the DEPARTMENT's Plan, Development Process, the applicable guidelines of the American Association of State Highway and Transportation officials, and applicable guidelines of the DEPARTMENT. The design shall include, but not be limited to, the following items:

a. The COUNTY shall validate the concept using revised traffic furnished by the DEPARTMENT.

b. The COUNTY shall update the environmental document, if required, and shall perform the necessary

studies and prepare any required reevaluation for review by the DEPARTMENT. The DEPARTMENT shall submit the reevaluation for approval.

c. The COUNTY shall obtain all required additional surveys, mapping, and soil investigation studies needed for the design of the PROJECT.

d. The COUNTY shall prepare preliminary plans, final right of way plans, and final construction plans and specifications for the PROJECT, including any bridges. All plans and documents, except right of way plans, shall be in metric units. One of the goals of the design of the PROJECT shall be to minimize the construction cost.

e. The DEPARTMENT shall furnish design traffic, the approved concept and approved environmental report. Mapping and surveys in metric units will be provided in electronic format. Compatible with Microstation software. Metric-unit cross sections along the preliminary construction centerline will also be furnished in electronic format compatible with CEAL software.

f. The DEPARTMENT shall review and has approval authority for all aspects of the PROJECT. The DEPARTMENT will work with the FHWA to obtain all needed approvals with information furnished by the COUNTY.

2. Upon the COUNTY's determination of the rights of way required for the PROJECT and the approval of the right of way plans by the DEPARTMENT, the COUNTY shall acquire, at

it's cost, the necessary rights of way for the PROJECT, using funds of the DEPARTMENT. Right of way acquisition shall be in accordance with the rules and regulations of the FHWA including, but not limited to, Title 23 United States Code (Uniform Act) and 49 CFR Part 24 and the rules and regulations of the DEPARTMENT. Failure to follow these requirements will result in loss of Federal funding for the project and it will be the responsibility of the COUNTY to make up the loss of that funding. All rights of way will be cleared of obstructions, including underground storage tanks, by the COUNTY prior to the DEPARTMENT's final acceptance of the plans and specifications for the taking of bids for the PROJECT.

3. The COUNTY shall be responsible for all utility adjustments and relocation costs necessary for the construction of the PROJECT.

4. The COUNTY shall follow DEPARTMENT procedures for identification of existing and proposed utility facilities on the project. These Procedures, in part, require all requests for existing, proposed, or relocated facilities to flow through the District Utilities Engineer.

* * *

6. Upon completion and approval of the PROJECT plans, certification that all needed rights of way have been obtained and cleared of obstructions, and obtaining all needed permits (including Corps of Engineers 404) for the PROJECT by the COUNTY, the DEPARTMENT shall let the PROJECT for construction. Except as provided herein, the DEPARTMENT shall bear all costs associated with the actual construction

and inspection and materials testing during construction. The DEPARTMENT shall be solely responsible for securing and awarding the construction contract for the PROJECT.

7. This Agreement is made and entered into in Fulton County, Georgia and shall be governed and construed under the laws of the State of Georgia.

The covenants herein contained shall, except as otherwise provided, accrue to the benefit of and be binding upon the successors and assigns of the parties hereto.

IN WITNESS WHEREOF, the DEPARTMENT and the COUNTY have caused these presents to be executed under seal by their duly authorized representatives.

RECOMMENDED:

s/ Walker W. Scott, Jr.
Walker W. Scott, Jr.,
State Urban Design Engineer

s/ Hoyt J. Lively, Jr.
Hoyt J. Lively, Jr.
Director of Preconstruction

s/ Frank L. Danchetz
Frank L. Danchetz
Chief Engineer

DEPARTMENT OF TRANSPORTATION

Appendix E

BY: s/ Wayne Shackelford
Wayne Shackelford
Commissioner

ATTEST:

s/ [illegible]

REVIEWED 10-3-94
(Date)

s/ [illegible]
Legal – Transportation

BOARD OF COMMISSIONERS
ROCKDALE COUNTY

BY: s/ [illegible]
Chairman

Signed, sealed and delivered
this 27 day of September,
1994, in the presence of:

s/ [illegible]
Witness

s/ [illegible]
Notary Public
Notary Public, Rockdale County, Georgia
My Commission Expires October 27, 1997

Appendix E

This Agreement approved by the
ROCKDALE COUNTY Commission at
a meeting held at Rockdale
the 27 day of September, 1994.

s/ [illegible]
County Clerk